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In The

Supreme Court of the United States

October Term 1996

BERNADINE SUITUM,

Petitioner,

v.

TAHOE REGIONAL PLANNING AGENCY,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF FOR AMICUS CURIAE COLUMBIA RIVER GORGE COMMISSION IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

INTEREST OF THE AMICUS CURIAE 1

SUMMARY OF ARGUMENT 4

STATEMENT OF THE CASE 5

ARGUMENT 5

I. The Final Decision Requirement Of The Ripeness Doctrine Serves Crucial Purposes 5

II. The Challenge To The Final Decision Requirement Of The Ripeness Doctrine In This Case Does Not Withstand Scrutiny 9

A. The Petitioner Ignores The Facts 9

B. The Petitioner Misapprehends The Law .. 11

III. The Use Of Innovative Approaches In Land Use Planning And Natural Resources Management Is An Important Element Of The Law 12

CONCLUSION 15

TABLE OF AUTHORITIES

CASES

Abbott Laboratories v. Gardner, 387 U.S. 136 (1967) 6

Agins v. Tiburon, 447 U.S. 255 (1980) 6

Broughton Lumber Co. v. Columbia River Gorge Comm'n, 975 F.2d 616, 621 (9th Cir. 1992) *cert. denied*, 114 S. Ct. 60 (1993) 6, 11

Columbia River Gorge United v. Yeutter, 960 F.2d 110 (9th Cir. 1992) *cert. denied sub nom, Columbia Gorge United v. Madigan*, 506 U.S. 863 (1992). 2, 7, 13

Cuyler v. Adams, 449 U.S. 433 (1981) 1

Estate of Friedman v. Pierce County, 112 Wash. 2d 68, 768 P.2d 462 (1989) 8

Fifth Avenue Corp. v. Washington County, 282 Or. 591, 581 P.2d 50 (1978) 8

Gardner v. New Jersey Pinelands Comm'n, 125 N.J. 193, 592 A.2d 25 (1991) 14

Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978) 4, 11

Pennsylvania Coal v. Mahon, 260 U.S. 393 (1922) 14

People ex rel. Younger v. County of El Dorado, 96 Cal. Rptr. 553 (1971) 9

Southern Pac. Transp. Co. v. Los Angeles, 922 F.2d 498 (9th Cir. 1990), *cert. denied*, 112 S. Ct. 382 (1992) 10

Texas v. New Mexico, 462 U.S. 554 (1983) 1

W. Birkenfeld Trust v. Bailey, 827 F. Supp. 651 (E.D. Wash. 1993) 8

Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985) 6, 8, 11

CONSTITUTIONAL PROVISIONS

U.S. Const., art. I, § 10, cl. 3 1

STATUTES

16 U.S.C. § 544. *et seq.* (1986) 1

Or. Rev. Stat. § 196.150 *et seq.* (1995) 1

Pub. L. 96-551, 94 Stat. 3233 (1980) 14

Wash. Rev. Code § 36.70A.090 (1994) 13

Wash. Rev. Code § 43.97 *et seq.* (1994) 1

OTHER AUTHORITIES

132 Cong. Rec. S15,637 (Oct. 8, 1986) (Statement of Sen. Hatfield) 3

Beaton and Pollock, *Economic Impact of Growth Management Policies Surrounding the Chesapeake Bay Area*, 68 Land Economics 434 (1992) 15

Beaton, *The Impact of Regional Land-Use Controls on Property Values: The Case of the New Jersey Pinelands*, 67 Land Economics 172 (1991) 15

Boulder County Land Use Code, Article 6 13

City of Seattle, Department of Construction and Land Use, Rule 20-93; The Center for Community Change (May 1995). 12

Frankfurter and Landis, *The Compact Clause of the Constitution - A Study in Interstate Adjustments*, 34 Yale L.J. 685 (1925) 13

U.S. Code Congressional and Administrative News, Vol. 6, 99th Cong., 2d Sess. 1986, Legislative History, PL 99-542 - 99-664 (Statement of President Reagan) 3

INTEREST OF THE AMICUS CURIAE

The Columbia River Gorge Commission submits this brief as amicus curiae pursuant to Supreme Court Rule 37. Counsel for the parties have consented to the filing of this brief and copies of their letters of approval are in the possession of the Clerk of the Court.

The interest of the Columbia River Gorge Commission in this case is three-fold. First, the Gorge Commission is a bi-state entity created by federal legislation and an interstate compact[1] between the States of Washington and Oregon to administer the Columbia River Gorge National Scenic Area Act, 16 U.S.C. § 544. *et seq.* (1986); Or. Rev. Stat. § 196.150 *et seq.* (1995); Wash. Rev. Code § 43.97 *et seq.* (1994) (Columbia River Gorge Compact). The National Scenic Area Act and the Columbia River Gorge Compact provide uniform legal standards and a comprehensive framework for protecting the scenic, cultural, recreational and natural resources, as well as the economy, along both sides of the Columbia River. The

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[1]The Compact Clause of the Constitution provides "No State shall, without the consent of Congress...enter into any Agreement or Compact with any other State..." U.S. Const., art. I, § 10, cl. 3. Congressional consent transforms an interstate compact into a law of the United States. *Cuyler v. Adams*, 449 U.S. 433, 440 (1981). Unless the law is somehow unconstitutional, a court may not "order relief inconsistent with its express terms." *Texas v. New Mexico*, 462 U.S. 554, 564 (1983).

resulting Columbia River Gorge National Scenic Area thus encompasses portions of both Washington and Oregon but they are administered as one region.

The Columbia River Gorge Commission operates in a manner very similar to the Tahoe Regional Planning Agency (TRPA) and in fact shares many features of TRPA -- including responsibility for implementation of a management plan for a unique area of remarkable splendor, where sensitive resources and development activities co-exist. A decision from this Court relating to the validity of TRPA's authority has a direct bearing on the Columbia River Gorge Commission.

Second, like TRPA, the Columbia River Gorge Commission utilizes a wide range of land use planning and resource management techniques while regulating development. These mechanisms reflect important advances in the field of land use and the extent to which they are available for implementation is a matter of exceptional concern to the Columbia River Gorge Commission. Like TRPA, the Columbia River Gorge Commission is charged with planning and management in an area Congress determined has "national significance." *Columbia River Gorge United v. Yeutter*, 960 F.2d 110 (9th Cir. 1992) *cert. denied sub nom, Columbia Gorge United v. Madigan*, 506 U.S. 863 (1992). In such an area, the use of innovative approaches to complex resource issues is essential.[2] Similarly, the presence of large tracts of public land

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[2]As President Reagan stated:

(continued...)

in both the Lake Tahoe region and the Columbia River Gorge reinforces the importance of the national interest at stake.

Third, like TRPA, the Columbia River Gorge Commission and other land use and resource agencies around the nation are required to respond to taking claims from time to time. The question of whether such claims are ripe arises in virtually every case. The need for a final decision with respect to the impact of regulations on a particular parcel of property is crucial. For these reasons, the Columbia River Gorge

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[2](...continued)

> "...I am signing this bill because of the far-reaching support in both states for a solution to the long-standing problems related to management of the Columbia River Gorge."

U.S. Code Congressional and Administrative News, Vol. 6, 99th Cong., 2d Sess. 1986, Legislative History, PL 99-542 - 99-664 (Statement of President Reagan).

As Senator Mark Hatfield stated:

> "The Columbia River Gorge National Scenic Area Act of 1986 is a bold and innovative vehicle which recognizes that a median position between little or no Federal protection for a scenically important area on the one hand, and a wilderness or national park designation on the other, is both prudent and necessary in this age."

132 Cong. Rec. S15,637 (Oct. 8, 1986) (Statement of Sen. Hatfield).

Commission has a well-defined interest in the correct interpretation, implementation and enforcement of interstate standards for enhancing the national interest.

SUMMARY OF ARGUMENT

The critical focus in a case of this nature is the factual background. A taking claim cannot be determined without it. For this reason, it is essential that one pursuing such a claim utilize the process provided by the agency to clarify the impact of the regulations on the property in question. Through use of the administrative process, agencies like TRPA have the opportunity to provide relief. In most cases, this is the end of the matter. Where it is not, another important objective is served: TRPA is able to make a final decision that provides the benchmarks for determining the value of the property after application of the regulations to the site.

The requirement of a final decision from the agency with respect to a taking claim is fundamental. As this Court held in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978), the key factors are: (1) the character of the government action; (2) its economic impact on the property owner; and, (3) the extent to which the regulation interferes with distinct investment-backed expectations. This inquiry is, of necessity, ad hoc and fact dependent. *Penn Central*, 438 U.S. at 125.

The decision of the Ninth Circuit Court of Appeals is squarely in accord with these precepts. The Ninth Circuit properly determined the claim in this case is not ripe because a

final decision regarding the value of petitioner's property does not exist. In the alternative, the uncontroverted value established by TRPA through the only expert testimony in the record reveals petitioner's claim of a per se taking does not withstand scrutiny. Moreover, since the property interest in issue is defined by state and federal law in the context of an interstate compact governing a sensitive area in proximity to public lands and resources, with comprehensive planning for an entire region, the Ninth Circuit correctly determined that utilizing TRPA's transfer of development rights program is not futile.

STATEMENT OF THE CASE

Amicus curiae Columbia River Gorge Commission adopts TRPA's statement of the case.

ARGUMENT

I. The Final Decision Requirement Of The Ripeness Doctrine Serves Crucial Purposes

The final decision requirement for a claim like the one in this case results in the evaluation of the impact of the regulations on the property in question. This enables planning agencies like TRPA to apply restrictions to the property while at the same time evaluating the owner's assertion that there is injury arising from the impact of the regulations. The assertion, however, taken by itself, is just that. The facts that shed light on the basis for the assertion are an essential prerequisite to clarity.

Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985) ("This Court consistently has indicated that among the factors of particular significance in the inquiry are the *economic impact* of the challenged action and the extent to which it interferes with reasonable investment-backed expectations. Those factors simply cannot be evaluated until the administrative agency has arrived at a *final, definitive position* regarding how it will *apply* the regulations at issue to the particular land in question." *Id.* at 186. (emphasis supplied)); *Agins v. Tiburon*, 447 U.S. 255 (1980).

The rationale for the final decision requirement of the ripeness doctrine is substantial: "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 (1967). Moreover, where the final decision requirement is applied, subsequent legal proceedings offer the opportunity for one case to address all the issues raised. *See Broughton Lumber Co. v. Columbia River Gorge Comm'n*, 975 F.2d 616, 621 (9th Cir. 1992) *cert. denied*, 114 S. Ct. 60 (1993) (citing with approval *Williamson County*) This ensures the efficient use of resources and furthers the related goals of agency and judicial economy.

Another important consideration in assessing the final decision requirement of the ripeness doctrine is continuity. In order for an agency to effectively and fairly manage the regulatory process, a system that ensures continuity advances important goals including equal protection under the law. The uniformity in this approach is a bulwark against claims of

invidious treatment -- a matter of particular importance in a special area like Lake Tahoe or the Columbia River Gorge where the statutory regime fashioned by Congress and approved by the states is particularly complex and unique. *See Columbia River Gorge United*, 960 F.2d at 110;[3] *see also* Brief of Amicus Curiae League to Save Lake Tahoe.

In addition, the larger question of stability comes into play. The final decision requirement precludes the prospect of

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[3]As the Ninth Circuit determined in upholding the constitutionality of the interstate framework for the Columbia River Gorge:

> "The district court found, and appellant does not dispute, that among Congress' concerns was a desire to preserve the beauty of the area for those who would travel to use the rivers and mountains in it for recreation, thus directly causing interstate travel. Congress also intended to regulate competing economic activities within the scenic area that are activities directly affecting interstate commerce. These activities include logging and fishing. Moreover, and perhaps most important, the area itself is unique in that it consists of portions of two states bisected by a navigable waterway. In such an area, virtually all activities affecting the land, the economy, the environment, or the resources have interstate ramifications. ...As the district court noted, Congress found this area to be one of critical national significance."

Columbia River Gorge United, 960 F.2d at 113.

expensive, premature and piecemeal litigation. *See W. Birkenfeld Trust v. Bailey*, 827 F. Supp. 651 (E.D. Wash. 1993) (citing with approval *Williamson County*). By ensuring a property owner uses the administrative system that brings the facts into clear focus, the agency is not required to defend against claims like the one in this case until basic questions of value are addressed through the decision-making process. Whether the process available at the agency level is the opportunity to transfer development rights or some other means of providing and assessing value, utilizing the administrative framework created by the agency furthers the objective of stability.

Moreover, the final decision requirement enunciated by this Court is followed by state courts in a manner that provides predictability. *Estate of Friedman v. Pierce County*, 112 Wash. 2d 68, 768 P.2d 462 (1989) (citing *Williamson County* -- "Courts cannot address inverse condemnation claims in a vacuum. They must be able to ascertain the remaining *value* of the regulated property. This necessity underlies the requirement of finality of governmental action...it is apparent that this State's exhaustion requirement is entirely consistent with notions of finality and ripeness as those terms are used in federal inverse condemnation analysis." *Id.* at 80) (emphasis supplied); *Fifth Avenue Corp. v. Washington County*, 282 Or. 591, 581 P.2d 50 (1978).

Finally, under the separation of powers doctrine, it is especially appropriate to allow the exercise of agency expertise in a case like the one before the Court. After all, Congress, in

concert with California and Nevada, explicitly directed TRPA to exercise broad authority in the development of a comprehensive planning program where innovative approaches are necessary to fulfill the purposes of the law. The factual and regulatory issues that are intertwined here in the context of interstate regulations dealing with a sensitive stream area and water quality, is a matter especially within the province of the agency.[4] In addition, the public trust doctrine requires TRPA to act with special care in protecting the region's resources.

II. The Challenge To The Final Decision Requirement Of The Ripeness Doctrine In This Case Does Not Withstand Scrutiny

A. The Petitioner Ignores The Facts

Petitioner's main argument in this Court is that the facts are already clear and there is no need to utilize TRPA's administrative process that enables the parties to evaluate the impact of the regulations on the value of the property.

The record, however, does not actually support this position. It is simply not possible to determine the extent to

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[4]Over twenty-five years ago, before petitioner's purchase of the property in this case, the California Supreme Court found that development interests threatened Lake Tahoe's "fragile ecology" and, that not only the scenic beauty of the region but "the very quality of its natural environment are now at stake." *People ex rel. Younger v. County of El Dorado*, 96 Cal. Rptr. 553, 554-555 (1971).

which petitioner is deprived of the value of her property. First, she failed to submit an application to the agency for approval to transfer the development rights that exist. Until this process is complete, a final decision in regard to the impact of the regulations on the value of the property does not exist. Second, petitioner failed to present even the semblance of a prima facie case for the deprivation of all value in the district court. By neglecting to offer any evidence in accord with the requirements for expert testimony, the taking claim rings especially hollow. A federal court lacks jurisdiction over such an action because there is no case or controversy and the court will not render advisory opinions regarding abstract issues. *Southern Pac. Transp. Co. v. Los Angeles*, 922 F.2d 498, 502 (9th Cir. 1990), *cert. denied*, 112 S. Ct. 382 (1992).

While one use sought by petitioner is precluded in TRPA's regulatory program, the record demonstrates she is not deprived of the value of her property. In pursuing litigation instead of utilizing the agency's administrative process, the property owner is shouting "fire" before the essential elements of combustion exist.

While petitioner is free to engage in this kind of speculation, any efficient use of the legal system must require the party seeking relief to first establish the predicate for jurisdiction in federal court -- a final decision that includes a determination regarding the impact of the regulation on the value of the property.

In this case, the requirements of TRPA's 1987 Regional Plan were in effect prior to petitioner's initial application for

residential development in 1989. The plan and the regulatory program provide opportunities for residential allocation, land coverage and development rights. In failing to pursue them, petitioner does not meet the final decision requirement. Both the regulation's economic impact and the extent to which it interferes with investment-backed expectations remain uncertain. *Penn Central*, 438 U.S. at 124; *Williamson County*, 473 U.S. at 191.

B. The Petitioner Misapprehends The Law

Petitioner argues that she has a right to develop her property with a specific structure,[5] while steadfastly ignoring the value it retains. But this assertion sidesteps the requirement of the Fifth Amendment which does not prohibit a taking of property but rather, forbids a taking of property without just compensation. *See Broughton Lumber Co.*, 975 F.2d at 621. Since TRPA's regulations include benefits as well as burdens, it is necessary to evaluate the facts before value is fully established. At this point, petitioner has not met this threshold by failing to participate in the regulatory process. The irony is that the only competent evidence in the record regarding the property was presented by TRPA and it establishes petitioner's development rights are valuable. For this reason, her claim on

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[5]Petitioner contends, for the first time on appeal, that denial of construction is a per se taking. *See* Brief In Opposition of Respondent Tahoe Regional Planning Agency To Petition For Writ Of Certiorari, 8.

behalf of the futility exception to the final decision requirement is groundless.

III. The Use Of Innovative Approaches In Land Use Planning And Natural Resources Management Is An Important Element Of The Law

The use of innovative approaches in land use planning and natural resources management in order to address complex issues is widespread. For example, at the municipal level, the City of New York and the City of Seattle have administered programs for the transfer of development rights for many years. The programs make an enormous contribution to public well-being. Planning, resource and development interests alike are advanced in a manner that has transformed areas and provided significant opportunities for property owners, while at the same time regulating impacts to protect the public interest.[6]

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[6]The City of Seattle uses transfers of development rights to preserve housing and landmark structures. This enables project proponents to purchase development rights from property owners to increase the size and square footage of new building projects. For example, the landmark Eagles Auditorium in the downtown area is under restoration to accommodate a major theater complex and 44 units of affordable housing. By purchasing development rights, the theater complex is allowed to increase the height and square footage of the structure while retaining its historic character. City of Seattle, Department of Construction and Land Use, Rule 20-93; The Center for Community Change (May 1995).

More recently, at the state level, in response to unprecedented growth in the Seattle and Puget Sound area, Washington adopted a system of growth management controls specifically including innovative approaches to land use planning and the transfer of development rights. The state's Growth Management Act provides: "A comprehensive plan should provide for innovative land use management techniques, including, but not limited to, density bonuses, cluster housing, planned unit developments, and the transfer of development rights." Wash. Rev. Code § 36.70A.090 (1990). Similarly, in Colorado, the County of Boulder adopted a transfer of development rights program in 1995. The purposes of the ordinance are for preservation of agriculture, open space, natural features and environmental resources. Boulder County Land Use Code, Article 6.

At the regional level, Lake Tahoe, like the Columbia River Gorge, is particularly well-suited to implement innovative approaches to planning and resource protection. The Compact Clause of the Constitution allows governance of both areas by interstate agreements -- "new instruments adapted to new situations" that are available "in the solution of problems presented by...growing interdependence." Frankfurter and Landis, *The Compact Clause of the Constitution - A Study in Interstate Adjustments*, 34 Yale L.J. 685, 688 (1925); *see also Columbia River Gorge United*, 960 F.2d at 115: "The Columbia

River Gorge Compact is just such an innovative solution to a difficult interstate land preservation problem."[7]

In addition, other regional agencies like TRPA and the Columbia River Gorge Commission have used new approaches to protect sensitive areas of special significance while ensuring citizens are not deprived of the value of their property. In New Jersey, the Pinelands Commission provides for the transfer of development rights while protecting important resources, especially traditional agricultural and forest areas, in a manner that preserves value for owners. *Gardner v. New Jersey Pinelands Comm'n*, 125 N.J. 193, 592 A.2d 25 (1991).

All of these programs, administered at the municipal, state and regional level, serve a wide variety of public and private interests that are, contrary to petitioner's exaggerated claim in this Court, far from "trivial." But these approaches to planning are not simply innovative -- more than that, they achieve important community objectives while preserving the "reciprocity of advantage." *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 415 (1922). Like TRPA's program, they confer

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[7]Congress demonstrated a special interest in the ecology of the Lake Tahoe area by revising the original 1969 Compact in 1980. Pub. L. 96-551, 94 Stat. 3233 (1980). *See* Brief for Amicus Curiae League to Save Lake Tahoe. As noted, public lands are an important component of the interstate framework which existed before petitioner purchased her property there.

benefits on citizens,[8] in concert with burdens. In addition, like the petitioner here, they are shared by all property owners who have elected to reside within an environmentally sensitive portion of a region like Lake Tahoe, the Columbia River Gorge or the Pinelands that contain unique and valuable resources, along with public lands, where federal and state interests are compelling.

CONCLUSION

The Columbia River Gorge Commission urges affirmance of the decision of the Ninth Circuit in this case. Petitioner's claims are not ripe and TRPA's regulatory requirements, as one part of a comprehensive framework for management of a unique interstate region, ensure the property in question retains value. The efficacy of the final decision requirement of the ripeness doctrine has stood the test of time and ensured courts are not inundated with speculative

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[8]For example, one recent study has documented that growth management controls in critical area legislation have resulted in an increase in property values in the Chesapeake Bay area, with similar results in Oregon and California. Beaton and Pollock, *Economic Impact of Growth Management Policies Surrounding the Chesapeake Bay Area*, 68 Land Economics 434 (1992). Another study reached a similar conclusion regarding New Jersey's Pinelands area. Beaton, *The Impact of Regional Land-Use Controls on Property Values: The Case of the New Jersey Pinelands*, 67 Land Economics 172 (1991).

allegations that every government regulatory action eliminates the value of property in violation of constitutional standards.

Moreover, the problem in this case is that petitioner has fashioned a new line of argument on appeal that is not based on the record below. In contending at trial that TRPA's transfer of development rights program did not offer any value, while now claiming a new right to specific development, petitioner has misapprehended the final decision requirement and the crucial focus on value.

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